

September 29, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-24 is available for public comments under this procedure. It was requested by William J. McGinley, Esq., Marc Elias, Esq., and Lawrence J. Tabas, Esq., on behalf of the National Republican Senatorial Committee ("NRSC"), the Democratic Senatorial Campaign Committee ("DSCC") and the Republican State Committee of Pennsylvania

Proposed Advisory Opinion 2006-24 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 4, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 3, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

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To obtain copies of documents related to AO 2006-24, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
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FEDERAL ELECTION
COMMISSION
SECRETARIAT

2006 SEP 29 A 9 44

September 29, 2006

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

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Subject: Draft AO 2006-24

AGENDA ITEM
For Meeting of: 10-4-06

SUBMITTED LATE

Attached are two proposed alternative drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for October 4, 2006.

Attachment

1 **ADVISORY OPINION 2006-24**

2 **William J. McGinley, Esq.**
3 **General Counsel**
4 **National Republican Senatorial Committee**
5 **425 Second Street, NE**
6 **Washington, DC 20002**

DRAFT A

7 **Marc Elias, Esq.**
8 **Counsel**
9 **Democratic Senatorial Campaign Committee**
10 **Perkins Coie LLP**
11 **607 Fourteenth Street, NW**
12 **Washington, DC 20005**

13 **Lawrence J. Tabas, Esq.**
14 **General Counsel**
15 **Republican State Committee of Pennsylvania**
16 **One Penn Center, 19th Floor**
17 **Philadelphia, PA 19103**

18 **Dear Messrs. McGinley, Elias and Tabas:**

19 **We are responding to your joint advisory opinion request on behalf of the**
20 **National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial**
21 **Campaign Committee ("DSCC") (on behalf of the committees themselves and the**
22 **committees' respective Members who are currently Federal candidates), and the**
23 **Republican State Committee of Pennsylvania ("State Party"). Your request concerns the**
24 **application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and**
25 **Commission regulations to the establishment and administration of funds by Federal**
26 **candidates' principal campaign committees and the State Party to pay recount and**
27 **election contest expenses resulting from the upcoming Federal elections on November 7,**
28 **2006 ("recount funds"), and the role that the NRSC and DSCC may play in the**
29 **administration of such recount funds.**

1 The Commission concludes that because election recount activities are in
2 connection with a Federal election, any recount fund established by either a Federal
3 candidate or the State Party must comply with the amount limitations, source
4 prohibitions, and reporting requirements of the Act. In addition, the Commission
5 concludes that the NRSC and DSCC, and their agents, may participate in planning and
6 strategy discussions with a Federal candidate or the State Party regarding the use of their
7 respective recount funds.

8 ***Background***

9 The facts presented in this advisory opinion are based on your letter received on
10 August 7, 2006.

11 ***NRSC and DSCC Involvement with Recount Funds***

12 The NRSC and DSCC are political committees comprised of sitting Members of
13 the United States Senate of their respective political party and include all incumbent
14 Senators who are currently Federal candidates. The primary function of these political
15 committees is "to aid the election of candidates affiliated with their respective parties,"
16 including providing political and financial support and guidance to Federal candidates.
17 The NRSC and DSCC intend to advise their Members in close elections to establish and
18 administer recount funds to be used to finance any recount, election contest or related
19 post-election litigation costs. The NRSC and DSCC also intend to conduct strategy and
20 planning sessions with Federal candidates and State party committees regarding the
21 establishment and administration of recount funds. These sessions will include
22 discussion of how recount funds should be raised and spent, as well as "recount and
23 election contest strategies and tactics."

1 *Federal Candidate Recount Funds*

2 Federal candidates who become involved in recounts intend to establish and
3 administer recount funds through their authorized committees. The Federal candidates
4 will retain all authority over the raising and spending of funds in the recount fund, but
5 will consult with national and State party committee officials regarding fundraising,
6 administrative issues, and strategies and tactics. The Federal candidates and their
7 authorized committees will not solicit or receive any funds from corporations, labor
8 organizations, national banks, or foreign nationals for the recount funds. Money raised
9 by the recount funds will not be used to pay for pre-election or Election Day expenses,
10 such as administrative costs, get-out-the-vote activities or communication expenses.
11 Instead, the recount funds will be used only to pay for “expenses resulting from a
12 recount, election contest, counting of provisional and absentee ballots and ballots cast in
13 polling places,” as well as “post-election litigation and administrative-proceeding
14 expenses concerning the casting and counting of ballots during the Federal election, fees
15 for the payment of staff assisting the recount or election contest efforts, and
16 administrative and overhead expenses in connection with recounts and election contests”
17 (“recount activities”).

18 *The State Party Recount Fund*

19 The State Party is the Republican State party for the Commonwealth of
20 Pennsylvania, and is registered with the Commission as a political party committee. The
21 State Party intends to establish a recount fund to support its Federal candidates by
22 financing recount, election contest and related post-election litigation costs. The State
23 Party will establish and administer the recount fund and will retain all authority over the

1 raising and spending of the recount fund. The State Party intends to consult with any
2 Federal candidate who is, or may be, involved in a recount or election contest prior to, on,
3 and after Election Day. The State Party will also consult with national party committee
4 officials regarding fundraising, administration, and recount and election contest strategies
5 and tactics. The State Party will not solicit or receive any funds from corporations, labor
6 organizations, national banks, or foreign nationals for the recount fund. Prior to or on
7 Election Day, no money raised by the recount fund will be used to pay for Federal
8 election activity, as defined in 2 U.S.C. 431(20) and 11 CFR 100.24, coordinated or
9 independent expenditures, exempt party activities, or any communications referring to
10 any Federal candidate. All recount funds will be used solely to pay for recount activities,
11 as described above.

12 The Pennsylvania Election Code does not limit the amount that may be
13 contributed with respect to State elections. It does, however, prohibit contributions by
14 national and State banks, corporations and unincorporated associations. 25 Pa. Stat. Ann.
15 §3253(a). State party committees are required to file reports of receipts, including
16 specific contributor information, and expenditures with the Secretary of the
17 Commonwealth. 25 Pa. Stat. Ann. §3246.

18 ***Questions Presented***

- 19 1. *Are recount activities conducted by a Federal candidate's recount fund in*
20 *connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A)*
21 *applies to the recount fund?*
- 22 a. *What amount limits apply to donations from individuals and political*
23 *committees to a Federal candidate's recount fund?*
- 24 b. *How should a Federal candidate's recount fund report its activities?*

- 1 c. *What are the restrictions, if any, on Federal officeholders or candidates and*
2 *State party officials raising funds for the Federal candidate's recount fund?*
- 3 2. *Are the State Party's recount activities involving Federal races "in connection*
4 *with an election for Federal office" so that only Federal funds may be used to pay*
5 *for these recount activities?*
- 6 a. *What amount limits apply to donations from individuals and political*
7 *committees to the State Party's recount fund?*
- 8 b. *How should the State Party's recount fund report its activities?*
- 9 c. *What are the restrictions, if any, on Federal officeholders or candidates*
10 *raising funds for the State Party's recount fund?*
- 11 d. *May the State Party involve a Federal candidate in its decision-making*
12 *regarding its recount activities and "fully coordinate" recount activities with*
13 *the Federal candidate?*
- 14 e. *May the State Party's recount fund pay attorney's fees and other litigation*
15 *costs incurred by a Federal candidate who is a party in a recount or election*
16 *contest?*
- 17 f. *Are the State law contribution limitations and reporting obligations*
18 *preempted by the Act and Commission regulations with regard to the State*
19 *Party's recount fund?*
- 20 3. *May the NRSC and DSCC, and their agents, participate in planning and strategy*
21 *sessions regarding the establishment, administration, fundraising strategies and*
22 *recount activities of a recount fund established by a Federal candidate or the*
23 *State Party?*
- 24 4. *May a Federal candidate or the State Party retain excess funds in the recount*
25 *funds for future elections, or must the funds be disposed of in some manner?*

26 ***Legal Analysis and Conclusions***

27 *Question 1: Are recount activities conducted by a Federal candidate's recount*
28 *fund in connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A)*
29 *applies to the recount fund?*

30 Yes, any recount fund established by a Federal officeholder or candidate is
31 subject to 2 U.S.C. 441i(e)(1)(A), and therefore any funds solicited, received, directed,

1 transferred, or spent are subject to the amount limitations, source prohibitions and
2 reporting requirements of the Act. This statutory provision applies regardless of whether
3 the recount fund is established as a separate bank account of a candidate's authorized
4 committee or a separate entity.

5 The Act and Commission regulations define the terms "contribution" and
6 "expenditure" to include any gift, loan, or payment of money or anything of value for the
7 purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11
8 CFR 100.52(a) and 100.111(a). Commission regulations promulgated before the
9 enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116
10 Stat. 81 (2002) ("BCRA"), make exceptions from the cited definitions for gifts, loans, or
11 payments made with respect to a recount of the results of a Federal election. 11 CFR
12 100.91 and 100.151.¹ Nonetheless, in recognition of the Act's prohibitions on
13 corporations, labor organizations, national banks, and foreign nationals making
14 contributions or donations "in connection with" Federal elections, *see* 2 U.S.C. 441b(a)
15 and 441e(a)(1)(A), these recount regulations expressly bar the receipt or use of funds
16 prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor
17 organizations, and national banks). 11 CFR 100.91 and 100.151.

18 In two advisory opinions, the Commission has addressed the application of pre-
19 BCRA law to election recounts. First, in Advisory Opinion 1978-92 (Miller), the
20 Commission concluded that any funds received by a separate organizational entity
21 established by the candidate's authorized committee solely for the purposes of funding an

1 election recount effort would not be subject to the contribution limitations of 2 U.S.C.
2 441a, and would not trigger political committee status or reporting obligations for the
3 separate election recount entity. The Commission also concluded that the separate
4 recount entity could not accept funds from corporations, labor organizations, and national
5 banks, which were included in 11 CFR 100.4(b)(15).² The Commission noted that
6 involvement of current officers and staff of the authorized committee as organizers and
7 principals in a separate election recount entity would not change these conclusions.

8 In Advisory Opinion 1998-26 (Landrieu), the Commission considered a
9 candidate's principal campaign committee that established, as a wholly separate entity, a
10 contested election trust fund. The Commission concluded that the trust fund was not
11 subject to reporting requirements and could accept amounts in excess of the contribution
12 limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as
13 specified in the predecessors to the recount regulations, 11 CFR 100.7(b)(20) and
14 100.8(b)(20).

15 BCRA took effect after these advisory opinions were issued. Under BCRA,
16 Federal candidates and officeholders may not solicit, receive, direct, transfer, or spend
17 funds "in connection with an election for Federal office" unless the funds are subject to
18 the limitations, prohibitions, and reporting requirements of the Act ("Federal funds").

¹ These recount regulations recognize that the Act's definition of "election" does not specifically include recounts. See 2 U.S.C. 431(1); see also 11 CFR 100.2. In 2002, these regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. See 67 Fed. Reg. 50582 (Aug. 5, 2002). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). See 45 Fed. Reg. 15080 (Mar. 7, 1980).

² Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. See 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

1 See 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.2(g). These restrictions apply to
2 Federal officeholders and candidates, their agents, and entities directly and indirectly
3 established, financed, maintained, or controlled by, or acting on behalf of, any such
4 candidates or officeholders. *Id.*; *see also* 11 CFR 300.60 and 300.61. Congress's choice
5 of the "in connection with" standard in 2 U.S.C. 441i(e)(1)(A) requires the Commission
6 to conclude that section 441i(e)(1)(A) applies to funds raised or spent on recounts of
7 Federal elections. This conclusion flows from the plain language of BCRA, as well as
8 the Commission's recount regulations dating to 1977 that are premised on the conclusion
9 that recounts are "in connection with" Federal elections. *See* 2 U.S.C. 441b(a),
10 441e(a)(1)(A); 11 CFR 100.91 and 100.151.

11 Therefore, 2 U.S.C. 441i(e)(1)(A) prohibits Federal officeholders and candidates,
12 their agents, and entities directly or indirectly established, financed, maintained or
13 controlled by or acting on behalf of one or more Federal officeholders or candidates,
14 from soliciting, receiving, directing, transferring, or spending funds for expenses related
15 to a recount of the votes cast in a Federal election, including the recount activities
16 described above, unless those funds are subject to the limitations, prohibitions, and
17 reporting requirements of the Act. Because Federal candidates would directly or
18 indirectly establish, finance, maintain, and control the recount funds under your proposal,
19 2 U.S.C. 441i(e)(1)(A) applies to the Federal candidates' recount funds.

20 To the extent that Advisory Opinions 1978-92 and 1998-26 differ from this result,
21 they are superseded.

22 (a) *What amount limits apply to donations from individuals and political*
23 *committees to a Federal candidate's recount fund?*

1 As discussed above, a Federal candidate's recount fund must not receive or solicit
2 donations in excess of the Act's amount limitations. 2 U.S.C. 441i(e)(1)(A). Thus, by
3 operation of 2 U.S.C. 441i(e), any recount fund established by a Federal candidate may
4 not receive donations that in the aggregate exceed \$2,100 per person or \$5,000 per multi-
5 candidate political committee.

6 However, because section 441i(e)(1)(A) does not convert the donations into
7 "contributions" for purposes of 2 U.S.C. 441a, donations to a Federal candidate's recount
8 fund will not be aggregated with contributions from those persons to the Federal
9 candidate for the general election. For these purposes, a recount is similar to a runoff
10 election, which is also subject to a contribution limit separate from the general election
11 contribution limit. Similarly, the aggregate biennial contribution limits of 2 U.S.C.
12 441a(a)(3) do not apply to an individual's donations to recount funds. Federal candidates
13 may advise prospective donors that donations to recount funds will not be aggregated
14 with contributions from individuals for purposes of the contribution limits for the general
15 election set forth in 2 U.S.C. 441a(a)(1)(A) or (2)(A) or the aggregate biennial
16 contribution limits set forth in 2 U.S.C. 441a(a)(3).

17 ***(b) How should a Federal candidate's recount fund report its activities?***

18 A Federal candidate may establish a recount fund either as a separate bank
19 account of the candidate's authorized committee, or as a separate entity. The required
20 reporting does not vary, but the authority for the reporting requirements depends on the
21 organizational option. If the recount fund is a separate account of the Federal candidate's
22 authorized committee, then its receipts and disbursements must be reported on the
23 authorized committee's reports as "other receipts" and "other disbursements." See

1 11 CFR 104.3(a)(3)(x)(A) and (b)(2)(vi)(A). If the recount fund is a separate entity
2 established by the Federal candidate, then the separate entity must report as an authorized
3 committee under 11 CFR 100.5(d) in order to comply with the reporting obligations
4 under 2 U.S.C. 441i(e)(1)(A). Under 11 CFR 104.3(f), the principal campaign committee
5 must consolidate in its report any other authorized committee's reports. Therefore, if the
6 recount fund is a separate entity, the Federal candidate's principal campaign committee
7 must still report the recount fund's receipts and disbursements as "other receipts" and
8 "other disbursements."

9 (c) *What are the restrictions, if any, on Federal officeholders or candidates*
10 *and State party officials raising funds for the Federal candidate's recount fund?*

11 As a general matter, Federal officeholders and candidates may solicit only funds
12 that are subject to the limitations, prohibitions, and reporting requirements of the Act in
13 connection with a Federal election. See 2 U.S.C. 441i(e). Because any recount fund
14 established by a Federal candidate will comply with the limitations, prohibitions and
15 reporting requirements of the Act, as explained in response to Question 1, Federal
16 officeholders and candidates may solicit funds for the recount fund consistent with this
17 restriction in 2 U.S.C. 441i(e). You specifically ask whether Federal officeholders and
18 candidates may appear as featured guests at fundraising events, participate in pre-event
19 publicity, sign fundraising letters and make telephone solicitations for the recount fund.
20 Such activity would be permissible as long as it is consistent with the restriction in 2
21 U.S.C. 441i(e). State party officials may also participate in fundraising for a Federal

1 candidate's recount fund so long as that fund complies with the amount limitations,
2 source prohibitions and reporting requirements of the Act.³

3 *Question 2: Are the State Party's recount activities involving Federal races "in*
4 *connection with an election for Federal office" so that only Federal funds may be used to*
5 *pay for these recount activities?*⁴

6 Yes, payments for recount activities involving Federal races are disbursements in
7 connection with a Federal election. Under 11 CFR 102.5(a)(1)(i) and 300.30(b)(3)(iii),
8 the State Party must use funds in a Federal account to pay for these recount activities.

9 As explained in response to Question 1, although recount funds are not considered
10 "contributions" or "expenditures" under Commission regulations, those funds received or
11 spent for recount activities are spent on activities "in connection with" a Federal election.
12 Pursuant to 11 CFR 102.5(a)(1)(i) and 300.30(b)(3)(iii), all disbursements in connection
13 with a Federal election made by a State party that has both Federal and non-Federal
14 accounts must be made from a Federal account.⁵ In addition, only Federal funds may be
15 deposited in a Federal account. See 11 CFR 102.5(a)(1)(i) and 300.2(g). Therefore, a
16 recount fund established by the State Party to conduct recount activities in support of the
17 party's Federal candidates must be a Federal account containing only Federal funds.⁶

³ As explained in response to Question 2(d), consultation and coordination between Federal candidates and State party officials does not result in the making of coordinated party expenditures under the Act.

⁴ You do not ask, and this advisory opinion does not address recounts and election contests relating solely to State or local candidate races.

⁵ The only exceptions pertain to disbursements from special allocation accounts. However, recount activities exclusively for Federal elections are not allocable activities.

⁶ This opinion does not apply to recounts and election contests relating solely to State or local candidate races.

1 ***(a) What amount limits apply to donations from individuals and political***
2 ***committees to the State Party's recount fund?***

3 Under 11 CFR 300.30(b)(3)(iii), the State Party's recount fund for recounts of
4 Federal races must comply with the amount limitations in the Act, and therefore may not
5 receive more than \$10,000 from a person or \$5000 from a multicandidate political
6 committee per calendar year. See 2 U.S.C. 441a(a)(1)(D) and 441a(a)(2)(C). As
7 explained in response to Question 1(a), requiring that this State Party recount fund
8 receive only Federal funds does not convert the donations into "contributions" for
9 purposes of 2 U.S.C. 441a. Consequently, donations to the State Party's recount fund
10 will not be aggregated with contributions from those same donors to the State Party for
11 the calendar year. Similarly, the aggregate biennial contribution limits of 2 U.S.C.
12 441a(a)(3) do not apply to individuals' donations to recount funds. The State Party may
13 advise prospective donors that donations to the State Party's recount fund will not be
14 aggregated with contributions from the same persons to the State Party in that calendar
15 year, or for the purposes of the aggregate biennial contribution limits of 2 U.S.C.
16 441a(a)(3).

17 ***(b) How should the State Party's recount fund report its activities?***

18 The State Party must establish a separate Federal account to pay for all Federal
19 recount activity. The State Party must report all of the recount fund's receipts and
20 disbursements to the Commission in accordance with 2 U.S.C. 434 and 11 CFR 104.3
21 because the recount fund is a Federal account of a State party committee.⁷

⁷ Your request also asks whether, if the State Party is not permitted to establish a recount fund, the State Party may use its non-Federal account to pay for recount activities. While the State Party may use a non-Federal account to pay for non-Federal recount activities consistent with State law, the State Party may only establish a recount fund for Federal races that is a separate Federal account.

1 (c) *What are the restrictions, if any, on Federal officeholders or candidates*
2 *raising funds for the State Party's recount fund?*

3 Federal officeholders and candidates may solicit only Federal funds for the
4 recount fund consistent with 2 U.S.C. 441i(e). As explained above in response to
5 Question 1(c), Federal officeholders and candidates may appear as featured guests at
6 fundraising events, participate in pre-event publicity, sign fundraising letters and make
7 telephone solicitations for Federal funds for the State Party's recount fund.

8 (d) *May the State Party involve a Federal candidate in its decision-making*
9 *regarding its recount activities and "fully coordinate" recount activities with the Federal*
10 *candidate?*

11 Yes, the State Party may involve a Federal candidate and the candidate's agents in
12 the decisions concerning the State Party's recount fund before, on, and after Election
13 Day.

14 In addition to Federal candidates, 2 U.S.C. 441i(e)(1)(A) also applies to "an entity
15 ... acting on behalf of 1 or more candidates or individuals holding Federal office." When
16 the State Party "fully coordinates" its recount activities with the Federal candidate whose
17 election is the subject of the recount, the State Party is acting on behalf of that candidate.
18 Consequently, section 441i(e)(1)(A) requires that the State Party spend only funds that
19 are subject to the limitations, prohibitions, and reporting requirements of the Act when
20 paying for these coordinated recount activities. One of these "limitations ... of the Act"
21 referenced in section 441i(e)(1)(A) is the amount limitation that State parties may spend
22 on their candidate under 2 U.S.C. 441a(d).⁸ Although 11 CFR 100.151 exempts recount

⁸ In Pennsylvania, that amount is \$761,500 for 2006.

1 activities from the definition of “expenditure,” section 441i(e)(1)(A) requires adherence
2 to the amount limitations of 2 U.S.C. 441a(d) without regard to the definition of
3 “expenditure,” just as section 441i(e)(1)(A) requires adherence to the amount limitations
4 of 2 U.S.C. 441a(a). However, the State Party would not be required to aggregate
5 amounts spent on coordinated recount activities with any coordinated expenditures for
6 the general election made on behalf of that candidate.

7 *(e) May the State Party’s recount fund pay attorney’s fees and other litigation*
8 *costs incurred by a Federal candidate who is a party in a recount or election contest?*

9 Yes, the State Party’s recount fund may pay attorney’s fees and other litigation
10 costs of a Federal candidate involved in a recount or election contest. The State Party
11 payment for a Federal candidate’s legal expenses in connection with a recount would be
12 coordinated recount activity. As explained in response to Question 2(d), the amount
13 limitation in 2 U.S.C. 441a(d)(3) would apply to coordinated recount activity. The State
14 Party should report such payments as disbursements of the Federal recount fund account
15 as explained in response to Question 2(b).⁹

16 *(f) Are the State law contribution limitations and reporting obligations*
17 *preempted by the Act and Commission regulations with regard to the State Party’s*
18 *recount fund?*

19 Yes, the Act states that its provisions and the rules prescribed under the Act
20 “supersede and preempt any provision of State law with respect to election to Federal
21 office.” 2 U.S.C. 453(a); 11 CFR 108.7(a). The House of Representatives

1 Administration Committee explained this provision's meaning in sweeping terms, stating
2 that it is intended "to make certain that the Federal law is construed to occupy the field
3 with respect to elections to Federal office and that the Federal law will be the sole
4 authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d
5 Cong., 2d Sess. 10 (1974).

6 When the Commission promulgated regulations at 11 CFR 108.7 on the effect of
7 the Act on State law, it stated that the regulations follow section 453 and that,
8 specifically, Federal law supersedes State law with respect to the organization and
9 registration of political committees supporting Federal candidates, disclosure of receipts
10 and expenditures by Federal candidates and political committees, and the limitations on
11 contributions and expenditures regarding Federal candidates and political committees.
12 See Explanation and Justification for 1977 Amendments to Federal Election Campaign
13 Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 51 (1977); 11 CFR 108.7(b). As
14 the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide
15 a comprehensive, uniform Federal scheme that is the sole source of regulation of
16 campaign financing . . . for election to Federal office." Advisory Opinions 2000-23 (New
17 York State Democratic Committee); 1999-12 (Campaign for Working Families); 1988-21
18 (Wieder).

19 Section 108.7(b)(3) of the Commission's regulations specifically preempts State
20 laws concerning limitations on contributions made and received by and expenditures

21

⁹ Your request also asks if the State Party may use a non-Federal account to pay a Federal candidate's legal expenses associated with a recount. As explained in response to Question 2, the State Party may only establish a recount fund for Federal races that is a Federal account of the State Party. The State Party may not finance any recount activities, including payment of attorney's fees for Federal candidates, from a non-Federal account.

1 made by Federal candidates and political committees. *See also* Advisory Opinion 2000-
2 23 (New York State Democratic Committee);. Although receipts and disbursements of
3 the State Party's recount fund are not "contributions" or "expenditures" under the Act,
4 these receipts and disbursements are in connection with a Federal election, and not in
5 connection with any non-Federal election. Thus, such recount funds are subject to the
6 amount limitations and source prohibitions in the Act, preempting the Pennsylvania
7 Election Code, 25 Pa. Stat. Ann. §§ 2600 *et. seq.* Moreover, because the State Party's
8 recount fund must be a separate Federal account that is not used for non-Federal election
9 spending, the reporting requirements of the Act and Commission regulations preempt the
10 reporting requirements of the Pennsylvania Election Code.

11 *Question 3: May the NRSC and DSCC, and their agents, participate in planning*
12 *and strategy sessions regarding the establishment, administration, fundraising strategies*
13 *and recount activities of a recount fund established by a Federal candidate or the State*
14 *Party?*

15 Yes, the NRSC and DSCC, and their agents, may participate in strategy sessions
16 regarding the raising and spending of these funds on recount activities without violating
17 the Act or Commission regulations, provided that the State Party does not use non-
18 Federal funds to pay expenses related to their participation. As the Supreme Court stated
19 in *McConnell v. FEC*, 540 U.S. 93, 161 (2003), BCRA "leaves national party committee
20 officers entirely free to participate, in their official capacities, with state and local parties
21 and candidates in soliciting and spending hard money."

22 National party committees, including NRSC and DSCC, may not solicit, receive,
23 direct or spend "any funds [] that are not subject to the limitations, prohibitions, and

1 reporting requirements of th[e] Act.” 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). As the
2 Explanation and Justification for 11 CFR 100.10 makes clear, this prohibition applies
3 regardless of whether such funds are “in connection with” a Federal election or for any
4 other purpose. See Explanation and Justification for Final Rule on Prohibited and
5 Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49089
6 (July 29, 2002) (“[T]he plain language of BCRA, supported by the legislative history,
7 indicates that the ban on national party raising and spending non-Federal funds was
8 intended to be broad, prohibiting a party from raising, receiving, or directing to another
9 person ‘a contribution, donation, or transfer of funds, or *any other thing of value*’ or
10 spending ‘*any funds*’ that are not subject to the Act’s limitations, prohibitions, and
11 reporting requirements.” (emphasis in original)). Thus, the NRSC and DSCC must pay
12 for all of the recount activities they conduct using entirely Federal funds.

13 ***Question 4: May a Federal candidate or the State Party retain excess funds in***
14 ***the recount funds for future elections, or must the funds be disposed of in some manner?***

15 You inquire very broadly as to all possible uses of leftover recount funds
16 including, but not limited to, whether such funds must be disposed of or whether they
17 may be kept in a separate account for future elections of the same candidate or be
18 transferred to other political committees. The Commission concludes that this question is
19 speculative, and a definitive answer depends upon various contingencies that may or may
20 not occur. This question is, therefore, hypothetical.¹⁰ Commission regulations explain
21 that requests posing a hypothetical situation, presenting a general question of
22 interpretation, or regarding the activities of third parties, do not qualify as advisory

¹⁰ Your request also asks what recordkeeping and reporting requirements would apply to excess recount funds retained for future elections. This question is also hypothetical.

1 opinion requests. 11 CFR 112.1(b). On this basis, the Commission expresses no opinion
2 regarding this question. If a Federal candidate or State Party in fact has excess funds in a
3 recount fund after the election, the candidate or party may wish to resubmit this question
4 for Commission consideration with specific proposed plans for the excess funds.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requestor may not rely on that
10 conclusion as support for its proposed activity.

11 Sincerely,

12 Michael E. Toner
13 Chairman

14 Enclosures (Advisory Opinions 2000-23, 1999-12, 1998-26, 1988-21 and 1978-92)

1 **ADVISORY OPINION 2006-24**

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4 **National Republican Senatorial Committee**
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DRAFT B

7 **Marc Elias, Esq.**
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12 **Washington, DC 20005**

13 **Lawrence J. Tabas, Esq.**
14 **General Counsel**
15 **Republican State Committee of Pennsylvania**
16 **One Penn Center, 19th Floor**
17 **Philadelphia, PA 19103**

18 **Dear Messrs. McGinley, Elias and Tabas:**

19 **We are responding to your joint advisory opinion request on behalf of the**
20 **National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial**
21 **Campaign Committee ("DSCC") (on behalf of the committees themselves and the**
22 **committees' respective Members who are currently Federal candidates), and the**
23 **Republican State Committee of Pennsylvania ("State Party"). Your request concerns the**
24 **application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and**
25 **Commission regulations to the establishment and administration of funds by Federal**
26 **candidates' principal campaign committees and the State Party to pay recount and**
27 **election contest expenses resulting from the upcoming Federal elections on November 7,**
28 **2006 ("recount funds"), and the role that the NRSC and DSCC may play in the**
29 **administration of such recount funds.**

1 The Commission concludes that because election recount activities are not in
2 connection with a Federal election, any recount fund established by either a Federal
3 candidate or the State Party is permitted to raise and spend unlimited funds from
4 individuals and Federal political committees, provided the funds are not from sources
5 prohibited by 2 U.S.C. 441b or 441e. In addition, the Commission concludes that the
6 NRSC and DSCC, and their agents, may participate in planning and strategy discussions
7 with a Federal candidate or the State Party regarding the use of their respective recount
8 funds.

9 ***Background***

10 The facts presented in this advisory opinion are based on your letter received on
11 August 7, 2006.

12 ***NRSC and DSCC Involvement with Recount Funds***

13 The NRSC and DSCC are political committees comprised of sitting Members of
14 the United States Senate of their respective political party and include all incumbent
15 Senators who are currently Federal candidates. The primary function of these political
16 committees is "to aid the election of candidates affiliated with their respective parties,"
17 including providing political and financial support and guidance to Federal candidates.
18 The NRSC and DSCC intend to advise their Members in close elections to establish and
19 administer recount funds to be used to finance any recount, election contest or related
20 post-election litigation costs. The NRSC and DSCC also intend to conduct strategy and
21 planning sessions with Federal candidates and State party committees regarding the
22 establishment and administration of recount funds. These sessions will include

1 discussion of how recount funds should be raised and spent, as well as “recount and
2 election contest strategies and tactics.”

3 *Federal Candidate Recount Funds*

4 Federal candidates who become involved in recounts intend to establish and
5 administer recount funds through their authorized committees. The Federal candidates
6 will retain all authority over the raising and spending of funds in the recount fund, but
7 will consult with national and State party committee officials regarding fundraising,
8 administrative issues, and strategies and tactics. The Federal candidates and their
9 authorized committees will not solicit or receive any funds from corporations, labor
10 organizations, national banks, or foreign nationals for the recount funds. Money raised
11 by the recount funds will not be used to pay for pre-election or Election Day expenses,
12 such as administrative costs, get-out-the-vote activities or communication expenses.
13 Instead, the recount funds will be used only to pay for “expenses resulting from a
14 recount, election contest, counting of provisional and absentee ballots and ballots cast in
15 polling places,” as well as “post-election litigation and administrative-proceeding
16 expenses concerning the casting and counting of ballots during the Federal election, fees
17 for the payment of staff assisting the recount or election contest efforts, and
18 administrative and overhead expenses in connection with recounts and election contests”
19 (“recount activities”).

20 *The State Party Recount Fund*

21 The State Party is the Republican State party for the Commonwealth of
22 Pennsylvania, and is registered with the Commission as a political party committee. The
23 State Party intends to establish a recount fund to support its Federal candidates by

1 financing recount, election contest and related post-election litigation costs. The State
2 Party will establish and administer the recount fund and will retain all authority over the
3 raising and spending of the recount fund. The State Party intends to consult with any
4 Federal candidate who is, or may be, involved in a recount or election contest prior to, on,
5 and after Election Day. The State Party will also consult with national party committee
6 officials regarding fundraising, administration, and recount and election contest strategies
7 and tactics. The State Party will not solicit or receive any funds from corporations, labor
8 organizations, national banks, or foreign nationals for the recount fund. Prior to or on
9 Election Day, no money raised by the recount fund will be used to pay for Federal
10 election activity, as defined in 2 U.S.C. 431(20) and 11 CFR 100.24, coordinated or
11 independent expenditures, exempt party activities, or any communications referring to
12 any Federal candidate. All recount funds will be used solely to pay for recount activities,
13 as described above.

14 The Pennsylvania Election Code does not limit the amount that may be
15 contributed with respect to State elections. It does, however, prohibit such contributions
16 by national and State banks, corporations and unincorporated associations. 25 Pa. Stat.
17 Ann. §3253(a). State party committees are required to file reports of receipts, including
18 specific contributor information, and expenditures with the Secretary of the
19 Commonwealth. 25 Pa. Stat. Ann. §3246.

20 ***Questions Presented***

- 21 1. *Are recount activities conducted by a Federal candidate's recount fund in*
22 *connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A)*
23 *applies to the recount fund?*
- 24 a. *What amount limits apply to donations from individuals and political*
25 *committees to a Federal candidate's recount fund?*

- 1 ***b. How should a Federal candidate's recount fund report its activities?***
- 2 ***c. What are the restrictions, if any, on Federal officeholders or candidates and***
3 ***State party officials raising funds for the Federal candidate's recount fund?***
- 4 **2. Are the State Party's recount activities involving Federal races "in connection**
5 **with an election for Federal office" so that only Federal funds may be used to pay**
6 **for these recount activities?**
- 7 ***a. What amount limits apply to donations from individuals and political***
8 ***committees to the State Party's recount fund?***
- 9 ***b. How should the State Party's recount fund report its activities?***
- 10 ***c. What are the restrictions, if any, on Federal officeholders or candidates***
11 ***raising funds for the State Party's recount fund?***
- 12 ***d. May the State Party involve a Federal candidate in its decision-making***
13 ***regarding its recount activities and "fully coordinate" recount activities with***
14 ***the Federal candidate?***
- 15 ***e. May the State Party's recount fund pay attorney's fees and other litigation***
16 ***costs incurred by a Federal candidate who is a party in a recount or election***
17 ***contest?***
- 18 ***f. Are the State law contribution limitations and reporting obligations***
19 ***preempted by the Act and Commission regulations with regard to the State***
20 ***Party's recount fund?***
- 21 **3. May the NRSC and DSCC, and their agents, participate in planning and strategy**
22 **sessions regarding the establishment, administration, fundraising strategies and**
23 **recount activities of a recount fund established by a Federal candidate or the**
24 **State Party?**
- 25 **4. May a Federal candidate or the State Party retain excess funds in the recount**
26 **funds for future elections, or must the funds be disposed of in some manner?**

27 ***Legal Analysis and Conclusions***

28 ***Question 1: Are recount activities conducted by a Federal candidate's recount***
29 ***fund in connection with an election for Federal office so that 2 U.S.C. 441i(e)(1)(A)***
30 ***applies to the recount fund?***

1 No, recount activities conducted by a Federal candidate's recount fund are not in
2 connection with an election for Federal office. Therefore, the restrictions of 2 U.S.C.
3 441i(e)(1)(A) do not apply to such a recount fund. However, Commission regulations
4 prohibit donations to a Federal candidate's recount fund from national banks,
5 corporations, labor organizations, and foreign nationals. 11 CFR 100.91 and 100.151.

6 The Act and Commission regulations define the terms "contribution" and
7 "expenditure" to include any gift, loan, or payment of money or anything of value made
8 by any person for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i)
9 and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations first
10 promulgated before the enactment of the Bipartisan Campaign Reform Act of 2002, Pub.
11 L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), make exceptions from the cited
12 definitions for "a gift, subscription, loan, advance, or deposit of money or anything of
13 value made with respect to a recount of the results of a Federal election." 11 CFR 100.91
14 and 100.151.¹

15 The recount regulations (11 CFR 100.91 and 100.151) are premised on the
16 Commission's interpretation of the statutory term "election" to exclude recounts. *See* 2
17 U.S.C. 431(1); *see also* 11 CFR 100.2. The Act defines elections to include, *inter alia*,
18 primary, general, special and runoff elections, but it does not include recounts. *See* 2
19 U.S.C. 431(1); 11 CFR 100.2. The Commission explained this exclusion when it first
20 promulgated the recount regulations in 1977. "Also excluded from the definition of
21 contribution is a donation to cover the costs of recounts . . . , since, though they are

¹ After BCRA was passed, these regulations were repromulgated and recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. *See* 67 Fed. Reg. 50582 (Aug. 5, 2002).

1 related to elections, [they] are not Federal elections as defined by the Act.” *See*
2 *Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of*
3 *1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 40 (1977)*. The recount regulations
4 expressly bar the donation, acceptance, or use of funds prohibited by 11 CFR 110.20
5 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks).
6 11 CFR 100.91 and 100.151.²

7 In two advisory opinions, the Commission has addressed the application of pre-
8 BCRA law to election recounts. First, in *Advisory Opinion 1978-92 (Miller)*, the
9 Commission concluded that any funds received by a separate organizational entity
10 established by the candidate’s authorized committee solely for the purposes of funding an
11 election recount effort would not be subject to the contribution limitations of
12 2 U.S.C. 441a, and would not trigger political committee status or reporting obligations
13 for the separate election recount entity. The Commission also concluded that the separate
14 recount entity could not accept funds from corporations, labor organizations, and national
15 banks, which were included in 11 CFR 100.4(b)(15).³ The Commission noted that
16 involvement of current officers and staff of the authorized committee as organizers and
17 principals in a separate election recount entity would not change these conclusions.

18 In *Advisory Opinion 1998-26 (Landrieu)*, the Commission considered a
19 candidate’s principal campaign committee that established, as a wholly separate entity, a

² Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980). From 1980 to 2002, these regulations appeared at 11 CFR 100.7(b)(20) and 100.8(b)(20).

³ *Advisory Opinion 1978-92 (Miller)* cited the then-current recount regulations found at 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

1 contested election trust fund. The Commission concluded that the trust fund was not
2 subject to reporting requirements and could accept amounts in excess of the contribution
3 limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as
4 specified in the predecessors to the recount regulations, 11 CFR 100.7(b)(20)
5 and 100.8(b)(20).

6 BCRA took effect after these advisory opinions were issued. Under BCRA,
7 candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend
8 funds “in connection with an *election* for Federal office” unless the funds are subject to
9 the limitations, prohibitions, and reporting requirements of the Act (“Federal funds”). 2
10 U.S.C. 441i(e)(1)(A) (emphasis added); *see also* 11 CFR 300.2(g). BCRA also imposes
11 limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend
12 “in connection with any *election* other than an election for Federal office.”
13 2 U.S.C. 441i(e)(1)(B) (emphasis added).

14 The Commission’s treatment of recount funds over the past 30 years, based on the
15 rationale that recounts are not “elections,” is well known by Congress. That treatment
16 was first expressed in the 1977 regulations, applied in Advisory Opinion 1978-92,
17 recodified in 1980, and applied again in Advisory Opinion 1998-26. At no point in this
18 period did Congress act to alter the Commission’s approach, although it amended the
19 FECA several times. In 2002, BCRA was enacted with no amendment to the definition
20 of “election” to include recounts. The legislative history offers no indication that Section
21 441i(e)(1) was intended to apply to recounts. When Congress is aware of an agency’s
22 interpretation of a statute and does not amend that statute, Congress is presumed to accept
23 that interpretation as correct. *See, e.g., Lorillard v. Pons*, 434 U.S. 575 (1978)

1 ("Congress is presumed to be aware of an administrative or judicial interpretation of a
2 statute and to adopt that interpretation when it re-enacts a statute without change.").

3 Following the enactment of BCRA, the Commission recodified its recount
4 regulations, and specifically reaffirmed that recounts are not "elections." When the
5 Commission reorganized its regulations regarding "contributions" and "expenditures"
6 during the BCRA rulemakings, one "commenter advocated the complete, or at least
7 partial, elimination of the exception to the definitions of 'contribution' and 'expenditure'
8 for recounts and election contests, on the basis that recounts and election contests, which
9 are not Federal elections as defined by the Act, *see generally Federal Election*
10 *Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) . . . 'serve as an avenue
11 for the use of soft money to influence federal elections,' as evidenced by unregulated
12 contributions used to pay for the 2000 Florida recount." *Explanation and Justification*
13 *for Final Rules on Reorganization of Regulations on "Contribution" and "Expenditure,"*
14 67 Fed. Reg. 50582, 50584 (Aug. 5, 2002). In response to this commenter, the
15 Commission specifically stated that "[t]his change is beyond the scope of this rulemaking
16 dealing only with nonsubstantive changes" *Id.*⁴ This regulatory history
17 demonstrates two key points. First, the Commission explicitly reaffirmed, post-BCRA,
18 its view that recounts are not "elections" under the law, citing its original 1977
19 regulation. Second, in reorganizing its regulations, the recount regulation was recodified
20 without substantive change.

⁴ Approximately one week earlier, the Commission noted in a different rulemaking that "[t]he exemption for recounts is addressed in the Commission's current rules at 11 CFR 100.7(b)(20) . . ." *Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49085 (July 29, 2002). The Commission specifically declined to alter that regulation when promulgating the "soft money" rules.

1 Finally, in its 2004 Legislative Recommendations to Congress, the Commission
2 asked Congress to clarify whether recounts should be subject to 2 U.S.C. § 441i(e)(1).⁵
3 Congress did not act on this request.

4 In light of the foregoing, the Commission finds its recount regulations at
5 11 CFR 100.91 and 100.151 to be valid and enforceable and unaffected by BCRA. To
6 conclude otherwise would constitute rewriting our regulation, which, of course, may not
7 be done via the advisory opinion process. See 2 U.S.C. § 437f(b) ("Any rule of law
8 which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially
9 proposed by the Commission only as a rule or regulation pursuant to procedures
10 established in section 438(d) of this title."); 11 CFR 112.4(e).⁶

11 Thus, recounts are not "elections" under the Act, see 2 U.S.C. § 431(1), so funds
12 solicited, received and spent in connection with a recount are not funds solicited, received
13 or spent in connection with an election, and are therefore not subject to
14 2 U.S.C. 441i(e)(1). There is no evidence that Congress intended through BCRA to
15 implicitly overturn either the Commission's longstanding rules or advisory opinions on
16 the treatment of recount funds, and in fact, there is substantial evidence of legislative
17 acquiescence to the Commission's longstanding treatment of recount funds.

⁵ See *Legislative Recommendations 2004*, available at http://www.fec.gov/pages/legislative_recommendations_2004.htm#441ie (visited September 28, 2006) ("The Commission recommends that Congress amend 2 U.S.C. 441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are "in connection with a Federal election" and are thus subject to the 441i(e)(1) restrictions.").

⁶ See also *Advisory Opinion 1999-11, Concurring Opinion of Wold, Elliott, and Mason* ("[A]dvisory opinions are clearly not rules or regulations. Advisory opinions may address only "the application of [the FECA] . . . or a rule or regulation prescribed by the Commission. . . . Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process. . . .").

1 Consequently, BCRA's restrictions at 2 U.S.C. 441i(e)(1) on Federal candidates
2 soliciting, receiving, directing, transferring, or spending funds in connection with either
3 Federal or non-Federal elections do not alter the Commission's prior treatment of funds
4 raised and spent by Federal candidates for recounts and recount funds.

5 *(a) What amount limits apply to donations from individuals and political*
6 *committees to a Federal candidate's recount fund?*

7 As discussed above, a Federal candidate's recount fund may accept funds
8 exceeding the Act's contribution limitations from individuals and political committees,
9 but is barred from accepting funds from corporations, labor organizations, national banks,
10 and foreign nationals under 11 CFR 100.91.

11 The aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not apply to
12 an individual's donations to recount funds. Federal candidates may advise prospective
13 donors that donations to recount funds will not be aggregated with contributions from
14 individuals for purposes of the contribution limits for the general election set forth in 2
15 U.S.C. 441a(a)(1)(A) or (2)(A) or the aggregate biennial contribution limits set forth in 2
16 U.S.C. 441a(a)(3).

17 *(b) How should a Federal candidate's recount fund report its activities?*

18 A Federal candidate may establish a recount fund either as a separate bank
19 account of the candidate's authorized committee, or as a separate entity. If the recount
20 fund is a separate account of the Federal candidate's authorized committee, then its
21 receipts and disbursements must be reported on the authorized committee's reports as
22 "other receipts" and "other disbursements," respectively. See 11 CFR 104.3(a)(3)(x)(A)
23 and (b)(2)(vi)(A). If the recount fund is a separate entity established by the Federal

1 candidate, then the separate entity is not subject to the Act's reporting requirements based
2 on its recount activities. *See* Advisory Opinions 1998-26 (Landrieu) and 1978-92
3 (Miller).

4 (c) *What are the restrictions, if any, on Federal officeholders or candidates*
5 *and State party officials raising funds for the Federal candidate's recount fund?*

6 As explained in response to Question 1, recounts are not elections under the Act,
7 so funds solicited, received, or spent in connection with a recount are not funds solicited,
8 received, or spent in connection with an election. Consequently, BCRA's restrictions in
9 2 U.S.C. 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or
10 spending funds in connection with either Federal or non-Federal elections do not apply to
11 Federal candidates' recount funds and thus do not alter the prior treatment of amounts
12 raised and spent by Federal candidates on recounts.

13 However, Federal officeholders, candidates, State party officials, and their agents
14 must comply with the source prohibitions in the Commission's recount regulations. *See*
15 11 CFR 100.91 and 100.151. Because the prohibitions of 11 CFR 110.20 and part 114
16 apply, Federal officeholders, candidates, State party officials, and their agents may not
17 solicit, accept or receive any donation for a recount fund from a foreign national, national
18 bank, corporation, or labor organization.

19 *Question 2: Are the State Party's recount activities involving Federal races "in*
20 *connection with an election for Federal office" so that only Federal funds may be used to*
21 *pay for these recount activities?*⁷

⁷ You do not ask, and this advisory opinion does not address recounts and election contests relating solely to State or local candidate races.

1 No, as explained in response to Question 1, recounts are not "elections" under the
2 Act, and the funds received and spent in connection with a recount are not funds received
3 or spent "in connection with an election for Federal office." Consequently, such funds
4 are not subject to the requirement that a State party use only Federal funds from its
5 Federal account to make disbursements in connection with a
6 Federal election. *See* 11 CFR 102.5(a)(1)(i), 300.2(g), and 300.30(b)(3)(iii).
7 Accordingly, the State Party is not required to use Federal funds to pay for these recount
8 activities.

9 Thus, the State Party's recount fund is not subject to the Act's amount limitations.
10 However, any recount fund established by the State Party to conduct recount activities in
11 support of the party's Federal candidates (not its State candidates) would be subject to the
12 recount regulations' source prohibitions, which bar the receipt or use of funds prohibited
13 by 11 CFR 110.20 (foreign nationals) and 11 CFR Part 114 (corporations, labor
14 organizations, and national banks). *See* 11 CFR 100.91 and 100.151. Therefore, the
15 State Party may pay for recount activities using funds that exceed the Act's amount
16 limitations, provided that those funds are not from foreign nationals, corporations, labor
17 organizations, or national banks. The State Party may set up a separate account to pay for
18 recount activities, but it is not required to do so. If the State Party does not establish a
19 separate account, it must use a reasonable accounting method to show that it complies
20 with the source prohibitions in 11 CFR 100.91. *See, e.g.*, 11 CFR 110.3(b)(4).

21 (a) *What amount limits apply to donations from individuals and political*
22 *committees to the State Party's recount fund?*

1 As explained in response to Question 2, under 11 CFR 100.91, the State Party is
2 permitted to raise funds from individuals and Federal political committees in unlimited
3 amounts for a fund that it will use to finance recount activities arising from a Federal
4 election, provided that the individuals are not foreign nationals. *See* 11 CFR 100.91 and
5 100.151.

6 ***(b) How should the State Party's recount fund report its activities?***

7 If the State Party chooses to pay for its recount activities with Federal funds out of
8 its Federal account, then it must comply with the Act's reporting requirements. *See*
9 *generally* 2 U.S.C. 434(b); 11 CFR 104.3. If, instead, the State Party chooses to pay for
10 its recount activities through a separate account or another non-Federal account, then no
11 Federal reporting obligations arise.

12 ***(c) What are the restrictions, if any, on Federal officeholders or candidates***
13 ***raising funds for the State Party's recount fund?***

14 As explained in response to Question 1, BCRA's restrictions in 2 U.S.C.
15 441i(e)(1) do not apply to election recount funds. Therefore, Federal officeholders,
16 candidates, and their agents may solicit funds for a State party's recount fund, which
17 must comply with the source prohibitions in the Commission's recount regulations. *See*
18 11 CFR 100.91 and 100.151.

19 ***(d) May the State Party involve a Federal candidate in its decision-making***
20 ***regarding its recount activities and "fully coordinate" recount activities with the Federal***
21 ***candidate?***

22 Yes, the State Party may involve a Federal candidate and the candidate's agents in
23 the decisions concerning the State Party's recount fund before, on, and after Election

1 Day. The FECA, as amended by BCRA, places no restrictions on a Federal candidate's
2 involvement with recount activity decision making. Furthermore, since expenses for
3 recount activities are not "expenditures," see 11 CFR 100.151, or campaign materials or
4 electioneering communications, a coordinated contribution cannot result. See 2 U.S.C. §
5 441a(a)(7)(B).

6 *(e) May the State Party's recount fund pay attorney's fees and other litigation*
7 *costs incurred by a Federal candidate who is a party in a recount or election contest?*

8 Yes, the State Party's recount fund may pay attorney's fees and other litigation
9 costs of a Federal candidate involved in a recount or election contest. As explained in
10 response to Question 1, money given with respect to a recount is not a "contribution" or
11 "expenditure" under the Commission's recount regulations at 11 CFR 100.91 and
12 100.151. Thus, the State Party payment for a Federal candidate's legal expenses in
13 connection with a recount would not be an in-kind contribution to the candidate, and no
14 amount limitations would apply. However, as explained in response to Question 2, the
15 source prohibitions in the Commission's recount regulations would apply. See 11 CFR
16 100.91 and 100.151.

17 *(f) Are the State law contribution limitations and reporting obligations*
18 *preempted by the Act and Commission regulations with regard to the State Party's*
19 *recount fund?*

20 Yes, the Act states that its provisions and the rules prescribed under the Act
21 "supersede and preempt any provision of State law with respect to election to Federal
22 office." 2 U.S.C. 453(a); 11 CFR 108.7(a). The House of Representatives
23 Administration Committee explained this provision's meaning in sweeping terms, stating

1 that it is intended "to make certain that the Federal law is construed to occupy the field
2 with respect to elections to Federal office and that the Federal law will be the sole
3 authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d
4 Cong., 2d Sess. 10 (1974).

5 When the Commission promulgated regulations at 11 CFR 108.7 on the effect of
6 the Act on State law, it stated that the regulations follow section 453 and that,
7 specifically, Federal law supersedes State law with respect to the organization and
8 registration of political committees supporting Federal candidates, disclosure of receipts
9 and expenditures by Federal candidates and political committees, and the limitations on
10 contributions and expenditures regarding Federal candidates and political committees.
11 See Explanation and Justification for 1977 Amendments to Federal Election Campaign
12 Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 51 (1977); 11 CFR 108.7(b). As
13 the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide
14 a comprehensive, uniform Federal scheme that is the sole source of regulation of
15 campaign financing . . . for election to Federal office." Advisory Opinions 2000-23 (New
16 York State Democratic Committee); 1999-12 (Campaign for Working Families); 1988-21
17 (Wieder).

18 The Commission's recount regulations at 11 CFR 100.91 and 100.151 indicate
19 that the receipts and disbursements of the State Party's recount fund are subject to the
20 source prohibitions in 2 U.S.C. 441b and 441e. Accordingly, the Commission's recount
21 regulations preempt the Pennsylvania Election Code, 25 Pa. Stat. Ann. §§ 2600 *et. seq.*
22 with respect to recounts of Federal elections.

1 **Question 3: May the NRSC and DSCC, and their agents, participate in planning**
2 **and strategy sessions regarding the establishment, administration, fundraising strategies**
3 **and recount activities of a recount fund established by a Federal candidate or the State**
4 **Party?**

5 **Yes, the NRSC and DSCC, and their agents, may participate in strategy sessions**
6 **regarding the raising and spending of these funds on recount activities without violating**
7 **the Act or Commission regulations. As the Supreme Court stated in *McConnell v. FEC*,**
8 **540 U.S. 93, 160-161 (2003),**

9 **Nothing on the face of § 323(a) [codified at 2 U.S.C. § 441i(a)] prohibits national**
10 **party officers, whether acting in their official or individual capacities, from sitting**
11 **down with state and local party committees or candidates to plan and advise how**
12 **to raise and spend soft money. As long as the national party committee officer**
13 **does not personally spend, receive, direct, or solicit soft money, [BCRA] permits**
14 **a wide range of joint planning and electioneering activity. Brief for Intervenor-**
15 **Defendants Sen. John McCain et al. in No. 02-1674 et al., p. 22 ('BCRA leaves**
16 **parties and candidates free to coordinate campaign plans and activities, political**
17 **messages, and fundraising goals with one another.').**

18
19 **In addition, as explained in response to Question 2(d), the NRSC and DSCC may**
20 **participate in planning and strategy sessions regarding recount activities of a Federal**
21 **candidate's or the State Party's recount fund without triggering the Commission's**
22 **coordinated party expenditure rules. See 2 U.S.C. 441a(d); 11 CFR 109.20 and 109.32.**

1 **Question 4: *May a Federal candidate or the State Party retain excess funds in***
2 ***the recount funds for future elections, or must the funds be disposed of in some manner?***

3 **You inquire very broadly as to all possible uses of leftover recount funds**
4 **including, but not limited to, whether such funds must be disposed of or whether they**
5 **may be kept in a separate account for future elections of the same candidate or be**
6 **transferred to other political committees. The Commission concludes that this question is**
7 **speculative, and a definitive answer depends upon various contingencies that may or may**
8 **not occur. This question is, therefore, hypothetical.⁸ Commission regulations explain**
9 **that requests posing a hypothetical situation, presenting a general question of**
10 **interpretation, or regarding the activities of third parties, do not qualify as advisory**
11 **opinion requests. 11 CFR 112.1(b). On this basis, the Commission expresses no opinion**
12 **regarding this question. If a Federal candidate or State Party in fact has excess funds in a**
13 **recount fund after the election, the candidate or party may wish to resubmit this question**
14 **for Commission consideration with specific proposed plans for the excess funds.**

15 **This response constitutes an advisory opinion concerning the application of the**
16 **Act and Commission regulations to the specific transaction or activity set forth in your**
17 **request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any**
18 **of the facts or assumptions presented, and such facts or assumptions are material to a**
19

⁸ Your request also asks what recordkeeping and reporting requirements would apply to excess recount funds retained for future elections. This question is also hypothetical.

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

3 Sincerely,

4 Michael E. Toner
5 Chairman

6 Enclosures (Advisory Opinions 2000-23, 1999-12, 1998-26, 1988-21 and 1978-92)